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TEXAS
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DISABILITY DISCRIMINATION

5th Circuit expands ADA accommodation duty

by Michael P. Maslanka
UNT Dallas College of Law

Your Americans with Disabilities Act (ADA) accommodation duty just got bigger. Way bigger. This trend has been lurking around for a while and resurfaced in early October in a new case from the U.S. 5th Circuit Court of Appeals, whose rulings apply to all Texas employers.

She asked, she received

Jacqueline Stokes has worked for the U.S. Department of Homeland Security (DHS) since 2007. She is visually impaired—blind in her right eye and with reduced vision in her left. Her job is to make travel arrangements for DHS employees. The department provided multiple accommodations for her disability, including a workstation with natural lighting, special lightbulbs, multiple monitors, and magnifying software and equipment.

In April 2014, Stokes asked for a new accommodation for on-site meetings. Because she would be away from her workstation to attend the sessions, she asked that (1) the meeting materials be provided to her in advance so she could read them in her accommodated space or (2) they be provided at the meeting but in a large font. In fact, she asked several times. Crickets.

She sues!

After asking for a full year and getting no response, Stokes filed an ADA lawsuit claiming she had been denied a reasonable accommodation. The trial court dismissed the complaint, adopting the theory that a reasonable accommodation is required for an employee to perform her essential job functions. Because attending a meeting isn't an essential function, the DHS wasn't in violation of the ADA.

Up on appeal the lawsuit goes, and the 5th Circuit said not so fast. The court looked at the rules implementing the ADA (called the Code of Federal Regulations), which define a reasonable accommodation as: "Modifications or adjustments that enable . . . an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." You can see there isn't a word about the reasonable accommodation being tethered to performing an essential job function. The appeals court noted that it made a similar holding in 2013, but apparently the word did not spread. Perhaps the second time will be the charm.

Bonus room: retaliation

Stokes also sued for retaliation, claiming she received a very poor evaluation because she sought a reasonable

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AGENCY ACTION

DOL announces record amount in recovered wages. The U.S. Department of Labor (DOL) announced in October that its Wage and Hour Division (WHD) had recovered a record $304 million in wages owed to workers in fiscal year (FY) 2018. The WHD also announced it set a new record for compliance assistance events in FY 2018, holding 3,643 educational outreach events to help employers understand their responsibilities under the law. The DOL also announced an extension of the voluntary Payroll Audit Independent Determination (PAID) program, which is a compliance initiative aimed at helping workers receive more back wages due in an expedited manner.

DOL launches new compliance assistance tools. The DOL has launched two new webpages—the New and Small Business Assistance page (www.dol.gov/whd/smallbusiness.htm) and the Toolkits page (www.dol.gov/whd/regs/compliance/CAKits.htm)—intended to provide small businesses and workers information from the WHD and links to other resources. The webpages, announced in October, were established in response to feedback from new and small business stakeholders voicing their need for a centralized location to secure the information needed to comply with federal labor laws. The pages provide publications and answer the questions most often asked by new and small business owners.

Compliance assistance available for AHPs. Employers offering association health plans (AHPs) can find compliance assistance materials on the DOL's employer.gov website. The materials—located at www.dol.gov/general/topic/association-health-plans—will help employers understand their Employee Retirement Income Security Act (ERISA) obligations when setting up and managing AHPs, which are intended to help small businesses pool resources and create health insurance plans for their employees.

OSHA program targets high injury, illness rates. The Occupational Safety and Health Administration (OSHA) announced in October that it was initiating the Site-Specific Targeting 2016 Program using injury and illness information electronically submitted by employers for calendar year 2016. The program targets high-injury-rate establishments in both the manufacturing and nonmanufacturing sectors for inspection. Under the program, OSHA inspects employers it believes should have provided 300A data for the 2016 injury and illness data collection. For 2016, OSHA required employers to electronically submit Form 300A data by December 15, 2017. The 2017 deadline was July 1, 2018, but employers were allowed to provide data after the deadline. ✤

accommodation and filed the court claim. As sportscasters say, let's go to the stats.

After waiting a year to get the requested accommodation, Stokes filed suit in April 2015. Her next scheduled performance review was in November 2015, and it was a disaster: a 1.4 out of 5 (5 being the highest) and thus an "unacceptable" rating, meaning she did not get a raise. Oh, what were her scores before then, you ask? Good question. She previously received a 3.8 out of 5, which translated to "exceeds expectations," and the year before that, she received an even higher "achieved excellence." The 5th Circuit said a jury should decide the retaliation claim as well.

Stokes said she asked several times for supporting documentation that illustrated her errors, but the department didn't provide them. (Nor did it submit the documentation to the court.) In addition to her previous good evaluations, she submitted 13 positive reviews from people in the department for whom she provided travel services. Here is what the appeals court said:

> Admittedly, Stokes' primary evidence rebutting her alleged poor performance is her own assertions that the descriptions in the performance review are incorrect. In support of its own position, however, [the department] similarly offers only the performance review itself and deposition testimony from the supervisor who prepared it stating that it is accurate.

In Texas, we call that a "Mexican standoff," and it is the jury—not a trial judge—who gets to decide who wins. *Stokes v. Nielsen et al.* (5th Cir., 2018).

Coming into focus

I can imagine what you may be thinking. Doesn't the employer get points for doing all that it did? Well, no. Look, disabilities change over time. They can worsen, and when they do, new and different accommodations must be afforded. While hiring persons with a disability is commendable and providing them with accommodations is laudable, you don't get to coast on your merit badge for the rest of the employees' tenure.

Here are some corollary points:

- What may seem minor to you can be a big deal to the person with a disability. After all, employees like Stokes are trying to be the best workers they can be, which should be encouraged, not discouraged. (If only all employees had that mindset!)
- Stokes' case stresses yet again that federal courts in Texas will take an expansive view of what must be discussed in terms of a reasonable accommodation.
- Will employee lawyers take these cases? After all, they seem like small potatoes. True enough, but a winning litigant can get the employer to pay 100 percent of her legal fees. Those can add up.
- Finally, Stokes' case draws a road map for employees' lawyers to follow in how to defeat an employer's response to a retaliation claim of "we had a good reason, trust us."

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ABSENTEEISM

Southwest flight attendant's FMLA claim is grounded

by Michael P. Maslanka
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The Family and Medical Leave Act (FMLA) is pervasive. The Act has rules—lots of them. This Texas case looks at the law from both the micro and the macro levels.

Facts

Amy DeVoss was a Southwest Airlines flight attendant who suffers from sinusitis. She was absent from work on June 7-11, 2015. On June 8, the employer sent FMLA paperwork for her to complete if she wished to use FMLA leave and not have the absences count against her. She had 15 days to complete the forms but didn't return them.

On June 24, DeVoss called Southwest and asked if, under a separate absence control policy, she would be assessed points for missing a flight. When the company told her that absence points would be assessed, she said she was ill because of her sinusitis condition. (As a matter of practice, Southwest tape-recorded the conversation.)

DeVoss was absent again for more than four days. Suspicious of the shifting reasons for her missed assignments, Southwest conducted an investigation, concluded that her illness excuse was a falsehood, and terminated her for alleged dishonesty. She sued under the FMLA.

Micro rule

DeVoss argued that Southwest violated the FMLA's prohibition against interfering with an employee's right to access leave. How? The company failed to send FMLA paperwork to her after she called on June 24, thereby frustrating her ability to access the leave. The trial court wasn't in a buying mood, however, and neither was the appeals court, which said:

> As the district court correctly held, the only reasonable conclusion supported by the record is that the two absences both stemmed from the same qualifying reason of sinusitis. Therefore, regardless of how granularly the line for requiring new notifications of FMLA eligibility may be drawn . . . the notice provided to DeVoss on June 8 need not be re-issued on June 24, (according to the Code of Federal regulations).

Thus, there was no interference claim based on the alleged lack of notice.

Macro rule

DeVoss argued that her termination also violated the FMLA's more general prohibition against interference. Why? Because an interference claim relieves the employee of having to demonstrate discriminatory animus on the employer's part. It merely requires proof that the employer failed to follow an FMLA rule (for whatever reason) and thus made it more difficult for the employee to obtain FMLA leave. But the appeals court said slapping a label on a claim doesn't make it an interference claim. Instead, what matters are the facts underlying the claim.

DeVoss asserted that she was fired for taking (or attempting to take) FMLA leave. To support this retaliation claim, she had to show that Southwest was motivated by discriminatory intent. She lost here as well because the employer had a good-faith belief that she was being dishonest based on her shifting reasons and other facts developed during the investigation. The appeals court cut to the quick:

> For purposes of an FMLA claim, what matters is not whether Southwest was objectively correct about DeVoss's dishonesty, but whether it had a good-faith belief that dishonesty existed, and that such belief was the basis for the termination. . . . To establish that the proffered nondiscriminatory reason is mere pretext, DeVoss must show that Southwest's explanation is false or unworthy of credence. [She] cannot establish pretext solely by relying on her subjective belief that unlawful conduct occurred.

DeVoss v. Southwest Airlines Company (5th Cir., 2018).

Smooth landings

How does an employer know if it has a good-faith reason? Try this: When a supervisor comes to tell you that she wants to terminate an employee, ask this question: "What is the factual basis for your decision?" And when I say factual, I mean something solid (like the keyboard on which I am typing this article)—not a barroom generality, a surmise or a hunch, or double hearsay (A told to B, and then B told the supervisor).

Finally, when it comes to determining what an FMLA rule is, don't guess. Look it up!

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HOSTILE WORK ENVIRONMENT

Del Taco sexual harassment case shows dangers of hiring minors

by Jacob M. Monty
Monty & Ramirez LLP

A recent lawsuit filed in a California federal court underscores the Equal Employment Opportunity Commission's (EEOC) reinvigorated focus on sexual harassment in the #MeToo era. It also shows the dangers involved with hiring minors.

'My girl'

While Katelyn Mejia was between the ages of 16 and 18, she and several coworkers at a California Del Taco restaurant were allegedly subjected to sexual harassment by a male shift leader, according to the EEOC's lawsuit. The suit claimed the shift leader would tell Mejia that he had dreams of having sex with her and that they should make those dreams a reality. He asked "why do you act like you do want it?" and would touch her back and growl in her ear.

Mejia wasn't the only alleged victim. The shift leader also would reportedly call a 17-year-old worker his "girl" and told her they should get married when she turned 18. The shift leader would tell other female employees about his sex life. And when they bent over, he would touch their hips or make comments about their bodies.

According to the EEOC, Del Taco should have known about the sexual harassment because Mejia and the other employees complained to HR, their supervisors, and the company's own 1-800 hotline. Instead of correcting the harassing conduct, the employer reduced Mejia's hours while many of the other victims resigned because of the harassment they suffered. The complaint, filed on September 17, 2018, also names other shift leaders, general managers, and coworkers as alleged harassers.

Risky business for employers

Unscrupulous coworkers may target susceptible minors with sexual advances that are not only unlawful but expose their employers to tremendous legal risk. Minors aren't old enough to sign arbitration clauses to resolve legal disputes privately and outside of the courtroom. Any case involving a minor has the potential to be decided in front of jurors who, by and large, will sympathize with the victim and be ready to give out a large verdict.

As the United States confronts a historic labor shortage, more employers are turning to minors to fill out their workforces. Those employers, however, must recognize and mitigate the risks associated with hiring minors. That includes carefully training employees about sexual harassment and having the proper policies and procedures in place to handle any problems that may arise. You would be best served in this area by turning to experienced labor and employment attorneys to provide workforce training and a review of your workplace policies.

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IMMIGRATION

USCIS efforts to spot fake documents affects employers

by Jacob M. Monty
Monty & Ramirez, LLP

As part of the Trump administration's efforts to crack down on unauthorized immigrants, the U.S. Citizenship and Immigration Services (USCIS) recently opened a new office in Los Angeles that will serve as the central location for finding and pursuing people suspected of using fake documents to obtain citizenship and other benefits.

New L.A. office to be up and running in 2019

The USCIS's new Los Angeles office will pay particular attention to immigrants who have been previously deported but later obtained legal status after adopting other identities. There is also some indication that the agency will move to have the U.S. Department of Justice (DOJ) take citizenship status away from any immigrant who used fake documents to obtain the benefit. The agency believes there may be thousands of offenders.

While the L.A. office has been opened, USCIS is still in the process of finding attorneys, immigration officers, and other staff. The office is expected to be up and running in 2019.

The USCIS's move is consistent with efforts seen from other agencies, such as Immigration and Customs Enforcement (ICE) and the DOJ, to renew enforcement of immigration compliance. The increased pressure from the Trump administration affects not only private citizens but employers as well. Companies may receive an influx of "no-match" letters caused by mismatched names and Social Security numbers in employees' immigration documentation.

Perhaps more likely, an immigrant's suspicious documents could serve as a reason for the government to

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IMMIGRATION INTEL

TN visas survive NAFTA rebrand

by Jacob M. Monty
Monty & Ramirez, LLP

Immigration provisions contained in the North American Free Trade Agreement (NAFTA) survived the renegotiated U.S. Mexico Canada Agreement (USMCA). Those currently on TN visas, and those hoping to obtain work authorization under the trade agreement, can continue to do so but should be wary that uncertainties remain.

Introducing USMCA

After more than a year of negotiations, the United States, Mexico, and Canada agreed on the USMCA as a replacement for the 24-year-old NAFTA agreement. Although the new agreement was reached and announced on September 30, 2018, the final version has yet to be published. Leaders of the three countries were expected to sign the agreement on November 30, 2018.

Once signed, the USMCA will be submitted to Congress, with a vote expected to take place early next year. Upon ratification, the agreement will come into force and have a 16-year term, with the opportunity for all countries to review it after six years.

How the USMCA mirrors NAFTA

With very minimal changes, the USMCA adopted the immigration provisions establishing visa eligibility previously set forth in NAFTA. Under the existing law, TN visas allow citizens of Mexico and Canada to enter the United States to perform services in a list of approved occupations if they hold the required minimum education and/or experience as designated by the agreement.

According to the U.S. Department of State, more than 64,000 TN visas were issued in the past five years under NAFTA's requirements. Despite recommendations to modernize and update the list of occupations to reflect current business needs and changes in the technology industry, no jobs were added or removed in the new agreement. The USMCA will continue to allow only professionals from the same 63 specific occupations that NAFTA previously permitted.

Despite the lack of major substantive changes to the TN visa program, the USMCA's effects on procedural processes remain uncertain. Under the new agreement, it's unclear if Canadian nationals will be allowed to continue to apply for admission as a TN professional directly at U.S. ports of entry. Further, no confirmation was made of potential revamped applications for the TN visa and/or how existing holders will be moved under the new program.

As of now, the most notable impact on the TN visa category seems to be a potential change in name. Currently, eligible individuals are granted "Trade NAFTA Professional 'TN' visas." Under the new law, it seems that individuals will be granted "Trade USMCA Professional" work visas, i.e., TU visas. Despite a new name and potential future procedural changes, the agreement's immigration provisions were essentially repackaged but preserved.

What Texas employers should do next

Employers wishing to sponsor an individual for TN work status should continue to do so. No changes directly affecting visa eligibility were made or are expected.

Since NAFTA's implementation, TN visas have been a preferred way to obtain U.S. work authorization because they aren't subject to an annual numerical cap, unlike with other work visa programs, such as the H-1B. Be sure, however, to stay on top of the latest developments to ensure you're following the proper procedures to obtain TN work authorization.

To receive more guidance on the USMCA's immigration and employment implications, contact Jacob Monty at jmonty@montyramirezlaw.com. ✤

WORKPLACE TRENDS

Research shows slow growth for middle-wage jobs. A study from CareerBuilder shows that high- and low-wage job growth is overshadowing the increase in middle-wage jobs. According to the study, the United States is expected to add 8,310,003 jobs from 2018 to 2023, with just one-fourth of them in the middle-wage category. Factored into the total job growth is an expected loss of 369,879 jobs over the same period, with middle-wage occupations experiencing the majority of the decline. The research shows that a total of 121 occupations will experience a decline in jobs between 2018 and 2023, and 75 of them are middle-wage jobs. High- and low-wage occupations are expected to have the highest net job growth from 2018 to 2023 at 5.71% and 5.69%, respectively. Middle-wage employment will grow at 3.83%. STEM-related occupations will continue to dominate fast-growing occupations, according to the research.

Survey shows willingness to provide tuition reimbursement. A Robert Half Finance & Accounting survey released in October shows that 63% of finance executives are willing to provide tuition reimbursement or professional development for new staff members who don't have a four-year degree. The survey also shows that a college diploma may not always be a requirement for new hires in accounting and finance, especially in areas such as accounts payable, accounts receivable, credit and collections, and payroll. The research suggests that companies with 1,000 or more employees are almost twice as likely as companies with 20 to 49 employees to provide tuition reimbursement or professional development to those new hires.

Report shows mental health benefit trends. The International Foundation of Employee Benefit Plans released a report in October examining the state of mental health and substance abuse in the workplace and how employers are taking action. The report found that 60% of U.S. and Canadian organizations are noticing an increase in mental illness and substance abuse compared to two years ago. Forty percent of organizations report their participants are very or extremely stressed, and almost 40% say stress levels are higher now than they were two years ago. The report identifies the top 10 mental health and substance abuse conditions covered by employers: depression, alcohol addiction, anxiety disorders, prescription drug addiction, nonprescription drug addiction, bipolar disorder, eating disorders, posttraumatic stress disorder, attention deficit disorder/attention deficit hyperactivity disorder, and autism. ✤

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perform a Form I-9 audit on that individual's employer to ensure that all employees are presenting the proper documentation. With the Trump administration nearly doubling Form I-9 penalty ranges (now $216 to $2,156 per violation), an unexpected audit can be devastating for employers.

Bottom line

You should audit your own Form I-9s to determine compliance and safeguard against potentially ruinous liability. Due to the complications that may arise from no-match letters or an audit, you should turn to law firms experienced in both immigration and employment law to ensure compliance and handle government investigations.

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EMPLOYEE BENEFITS

Wellness programs are about more than health insurance costs

When attorneys talk or write about wellness programs, it's almost always from a highly legal perspective. We could talk all day about the convoluted and overlapping requirements of the various laws that apply to such programs. But this month, we want to take a different approach and look at wellness programs from more of a business perspective.

People tend to get caught up in the idea that a wellness program's main purpose is to reduce the cost of providing health insurance. The truth is, there's not a lot of data to support that idea. There is, however, plenty of data to support other cost reductions that can result from a properly designed and managed wellness plan.

Improving employee health

According to Aflac, 61% of employees say they have made healthier lifestyle choices because of their company's wellness program. And unlike savings on health benefits, it's fairly easy to demonstrate that wellness plans have a positive impact on specific health concerns that may be prevalent in your employee population. Many health insurance carriers, third-party administrators, and brokers can provide detailed (deidentified) data about the incidence of such conditions, and you can use that information to develop wellness initiatives to address the most common or costly ones.

For example, smokers cost roughly $6,000 more than nonsmokers in annual healthcare expenses and lost productivity. If a high percentage of your employees have smoking-related health problems, you could reduce those costs by developing policies, initiatives, and incentives to help them quit smoking. You could take a similar approach for obesity, diabetes, blood pressure, anxiety, and so on.

Reducing workers' comp claims and costs

According to the University of Michigan's Health Management Research Center, employees with high health risks have the highest workers' compensation costs. For example, the National Council on Compensation Insurance compared the claims of obese employees to nonobese ones and found that:

- Obese claimants were twice as likely to file a claim;
- The duration of their claims was about 13 times longer; and
- Their medical costs were 6.8 times higher.

Depression, anxiety, and smoking can have similar impacts on your workers' comp claims experience. By helping your employees address their serious health concerns, you have a very good chance of reducing your workers' comp costs.

A similar impact can be seen on the incidence and ultimate cost of both short- and long-term disability claims.

Improving engagement and retention

In today's tight labor market, many employers believe the first step toward maintaining staffing levels is to keep as many of their good employees as they can. Wellness plans can help with that. In a study from the International Foundation of Employee Benefit Plans, 67% of employers offering a wellness plan reported that it improved employee satisfaction. Similarly, other recent studies have found that:

- 74% of employers view well-being as a useful tool for recruiting and retaining staff;
- 66% said their wellness initiatives resulted in increased productivity;
- 50% reported decreased absenteeism; and
- 54% reported that their most improved metric is employee morale.

Wellness programs can also help with recruitment. Eighty-nine percent of workers at companies that support well-being

UNION ACTIVITY

"Public charge" proposal prompts union criticism. Unions are reacting to the U.S. Department of Homeland Security's (DHS) plan to change policy related to the "public charge" provisions of immigration law. "Public charge" refers to an individual who is likely to become primarily dependent on the government, according to U.S. Citizenship and Immigration Services (USCIS). On October 10, the Trump administration published a Notice of Proposed Rulemaking on the policy, potentially making more people ineligible for permanent residence. National Education Association President Lily Eskelsen Garcia said the proposed change "will have a destructive impact on our students and their families." Service Employees International Union Vice President Rocio Saenz said, "New Americans pay city, county, state, and federal taxes that strengthen their communities and finance health care and social service programs. If they are driven into the shadows or out of this country, everyone will suffer."

Columbia University postdocs vote for union. Columbia University postdoctoral researchers announced in October that they have formed the Columbia Postdoctoral Workers-UAW union. In a National Labor Relations Board (NLRB) election held October 2 and 3, the vote to unionize with the United Auto Workers (UAW) passed by a margin of 68 percent. The vote sets up what the union said will be the first union contract covering postdocs at a private university. According to the UAW, the Columbia University vote means more than 17,000 graduate student workers, contingent faculty, and postdocs across the Northeast United States have chosen UAW representation in the last five years. The union advocates said they wanted to form a union to negotiate salaries, ensure stronger workplace sexual harassment protections, and get help with immigration and visa issues facing international postdocs.

Union launches first-responders website. The Communications Workers of America has launched FirstResponderVoice.org, a new advocacy initiative and website devoted to increasing the availability of information about the First Responder Network Authority (FirstNet), an independent agency within the U.S. Department of Commerce. The union said the creation of FirstNet has placed a spotlight on emergency communications. According to the union, the website "is poised to be a leading resource for first responders—professional and volunteer, urban and rural—and other public-safety stakeholders, including IT directors, emergency communications coordinators, private citizens and elected officials, to learn how communities can take full advantage of FirstNet and stay abreast of developments related to emergency communications and public safety." ✤

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are more likely to recommend their company as a good place to work.

Final thoughts

Employees don't always respond positively to wellness incentives. You should be very deliberate in designing and rolling out a program that best suits your workforce. You can start by:

(1) Conducting employee surveys to see what types of offerings they are receptive to;

(2) Promoting wellness as a part of your culture rather than just linking it to the health plan;

(3) Implementing general policies that encourage healthy habits (such as generous paid leave policies and flextime);

(4) Including employees in the planning and implementation process (e.g., through a wellness committee); and

(5) Implementing the program in stages (potentially over several years) rather than unveiling it all at once.

Of course, there are legal concerns associated with implementing a wellness program, and you should definitely contact your attorney if you have any questions about the legal implications of your plan. But in the broad scheme of things, those concerns are likely a relatively small part of the process of creating a wellness program that results in positive outcomes for you and your employees. ✤

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